IN THE

Supreme Court of the United States

OCTOBER TERM, 1946

No. 63

THE ORDER OF RAILWAY CONDUCTORS OF AMERICA, H. W. Fraser, *et al.*, *Petitioners,*

vs.

O. E. SWAN, *et al.*, *Respondents.*

No. 64

F. J. WILLIAMS, *et al.*, *Petitioners,*

vs.

O. E. SWAN, *et al.*, *Respondents.*

BRIEF FOR PETITIONERS

On Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

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Nos. 63 and 64

THE ORDER OF RAILWAY CONDUCTORS OF AMERICA, H. W. FRASER, President and F. H. NEMITZ, Senior Vice-President; and BROTHERHOOD OF RAILROAD TRAINMEN, A. F. WHITNEY, President and S. R. HARVEY, Assistant President, *Petitioners.*

v.

O. E. SWAN, T. K. FAHERTY, R. A. KNOFF, L. L. MCDONALD, L. O. MURDOCK, H. J. REESER, J. W. COX, E. W. FOWLER, R. A. WALTON, W. O. HOLMES and J. M. FOX, *Respondents.* RAILROAD YARDMASTERS OF AMERICA, GREAT NORTHERN RAILWAY COMPANY AND SOUTHERN PACIFIC COMPANY, *Intervenor-Respondents.*

F. J. WILLIAMS, WILLIAM BISHOP, PAUL M. CARTER, M. J. LEACH, and FRED LEWIS, Individually, and as Members of the National Railroad Adjustment Board, *Petitioners.*

v.

O. E. SWAN, T. K. FAHERTY, R. A. KNOFF, L. L. MCDONALD, L. O. MURDOCK, H. J. REESER, J. W. COX, E. W. FOWLER, R. A. WALTON, W. O. HOLMES and J. M. FOX, *Respondents,* RAILROAD YARDMASTERS OF AMERICA, GREAT NORTHERN RAILWAY COMPANY AND SOUTHERN PACIFIC COMPANY, *Intervenor-Respondents.*

BRIEF FOR PETITIONERS

On Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

OPINIONS BELOW

The opinion of the District Court appears at Record 222-227. The opinion of the Circuit Court is reported in 152 F. 2d. 325 and appears at Record 271-279.

JURISDICTION

The judgment of the Circuit Court was entered December 21, 1945. Petition for certiorari was filed on March 18, 1946, and was granted on April 22, 1946. The jurisdiction of this court is invoked under Section 240(a) of the Judicial Code as amended.

STATUTE INVOLVED

The Railway Labor Act as amended (45 U. S. C. A. Sec. 151, et seq.), the pertinent provisions of which are set forth in the appendix, *infra*.

STATEMENT

The National Railroad Adjustment Board was created by the amendments to the Railway Labor Act of June 21, 1934. Section 3, First (h) of the Act provides in part as follows:

> "(h) The said Adjustment Board shall be composed of four divisions, whose proceedings shall be independent of one another, and the said divisions as well as the number of their members shall be as follows:
>
> "First Division: To have jurisdiction over disputes involving *train-and yard-service* employees of carriers; that is, engineers, firemen, hostlers, and outside hostler helpers, conductors, trainmen, and *yard-service* employees.[1]

The question presented involves the interpretation of the Railway Labor Act, that is, whether the First Division of the National Railroad Adjustment Board has jurisdiction over disputes involving railroad yardmasters. Petitioners contend that Congress used the term "yard-service employees" in Section 3, First (h) of the Act as inclusive of yardmasters as well as other crafts in yard service, and that

[1] Emphasis is supplied in this brief unless otherwise noted.

the First Division has jurisdiction over yardmaster disputes.

The Act provides that the Second Division shall have jurisdiction over disputes involving certain classes of rail employees usually designated as the shop craft employees. The Third Division is given jurisdiction over disputes involving station, tower and telegraph employees, train dispatchers, maintenance-of-way men, clerical employees, freight handlers, express, station and store employees, signalmen, sleeping car conductors, sleeping car porters and maids, and dining car employees.[2]

The jurisdiction of the Fourth Division is as follows:

> "Fourth Division: To have jurisdiction over disputes involving employees of carriers directly or indirectly engaged in transportation of passengers or property *by water*, and all other employees of carriers over which jurisdiction *is not given* to the First, Second, and Third Divisions."

Respondents contend and the Circuit Court of Appeals for the Seventh Circuit affirmed a judgment of the District Court holding that railroad yardmasters are not "yard-service employees" and that the Fourth Division has exclusive jurisdiction over such disputes under the "catch-all" provision, "all other employees of carriers over which jurisdiction is not given to the First, Second and Third Divisions."

The First, Second and Third Divisions of the Adjustment Board are composed of five representatives of *rail* carriers and five representatives of national labor organizations representing *rail* employees. The Fourth Division is composed of three representatives of carriers directly or indirectly engaged in transportation *by water* and three representatives of national labor organizations represent-

[2] No claim has been made either by petitioners or by respondents that the Second or Third Division of the Adjustment Board has jurisdiction of disputes involving yardmasters.

ing *marine* employees. The railway and marine labor organizations represented on the First and Fourth Divisions of the Adjustment Board are set forth in Appendix II of this brief.

Prior to August 28, 1941, the First Division of the National Railroad Adjustment Board assumed jurisdiction, pursuant to the provisions of Section 3, First (h) of the Railway Labor Act, of disputes involving railroad yardmasters, and rendered awards in such disputes. (R. 230, 210 Plaintiffs' Exhibit K.)

On March 21, 1938, the Railroad Yardmasters of America, intervenor herein, filed the disputes of three individual yardmasters with the Fourth Division of the Adjustment Board (R. 231). The carrier and labor members of the Fourth Division deadlocked on the question of the jurisdiction of that division to hear these cases (R. 231, 174-175). Thereupon, the Railroad Yardmasters of America brought action in the United States District Court for the Northern District of Illinois, Eastern Division (Chancery No. 16031), against the members of the Fourth Division for a writ of mandamus commanding the Fourth Division to docket and hear the three submissions (R. 231, 158, 171-175). The carrier members of the Fourth Division filed answer admitting the allegations of the petition (R. 175-176). No answer was filed by the labor members of the Fourth Division (R. 177).

On July 11, 1938, the United States District Court for the Northern District of Illinois, Eastern Division, Honorable William H. Holly presiding, upon the admissions of the carrier members and the *default* of the labor members representative of maritime unions, entered its decree, known in this record as Chancery No. 16031, holding that the Fourth Division had *exclusive* jurisdiction of yardmaster disputes and ordering that division to hear the three disputes submitted to it (R. 231, 177, 181). The Railroad Yardmasters of America plead the decree in Chancery No. 16031 as a final and binding adjudication of the issues raised by

the petitioners in this cause (R. 115). The District Court, Honorable William H. Holly again presiding, held the decree in Chancery No. 16031 not to be res judicata, stating in its memorandum opinion that the decree had been induced *"by collusion of the parties and without any consideration of the issues involved"* (R. 224).

Pursuant to the order of Chancery No. 16031, the Fourth Division assumed jurisdiction of disputes involving yardmasters submitted to it and heard and rendered awards in such disputes *subsequent to July 11, 1938* (R. 231). The First Division, however, *continued* to assert jurisdiction over yardmaster disputes until August, 1941 (R. 230, 231).

On August 28, 1941, the five carrier members of the First Division of the Adjustment Board informed the five labor members of that division that in view of the decree in Chancery No. 16031 of July 11, 1938, directed to the Fourth Division, the carrier members of the First Division would not agree to set yardmaster cases docketed with it for hearing or participate in decisions on the merits. (R. 186-188, 231) The letter of the carrier members proposed that these dockets and similar disputes and submissions arising in the future involving yardmasters be docketed with the Fourth Division "since it appears that by the terms of the amended Railway Labor Act, *as construed by the District Court of the Northern District of Illinois, Eastern Division*, jurisdiction over the subject matter of each of the aforecited dockets is vested in the Fourth Division" (R. 186-188). It will be noted that the carrier members did not assert that yardmasters were not in yard service or were not "yard-service employees" within their own understanding of that term, but based their decision entirely upon the collusive decree in Chancery No. 16031 (R. 186-188).

Since August 28, 1941, the carrier members and the labor members of the First Division have been deadlocked on the question of the jurisdiction of that division over disputes involving yardmasters. As a result yardmaster disputes

docketed with the First Division by the petitioners remain unconsidered and unadjusted (R. 231).

Following the deadlock of the First Division on and after August 28, 1941, petitioners on January 12, 1942, filed their petition in this cause in the District Court for the Eastern District of Illinois for a declaratory judgment that the First Division of the National Railroad Adjustment Board has exclusive jurisdiction of disputes involving yardmasters within the terms and definitions of the Railway Labor Act, and particularly Section 3, First (h) thereof (R. 2-88, 145-146). The members of the First and Fourth Divisions of the Adjustment Board were made parties defendant (R. 2, 144),[3] The District Court permitted the Railroad Yardmasters of America, a labor organization representing only yardmasters with the exception of a few stationmasters, the Great Northern Railway Company, and the Southern Pacific Company to intervene as parties defendant (R. 108, 131-132).[4]

It is without controversy that yardmasters are "employees" subject to the Railway Labor Act within the definition contained in Section 1, Fifth, of the Act, and the orders of the Interstate Commerce Commission.[5] It is also without controversy that yardmasters work in a railroad yard (R. 162). The issue presented is whether Congress intended to use the term "yard-service employees" as inclusive of yardmasters as well as other yard crafts whose work is directly connected with yard operation and the switching of trains and cars in railroad yards, and grant jurisdiction

[3] The answer of the labor members of the First Division appears at Record 88-92. The answer and counterclaim of the carrier members of the First Division appears at Record 93-104, 147-148. The answer of the carrier members of the Fourth Division appears at Record 151. The petitioners' reply to answer and counterclaim of the carrier members appears at Record 154-155.

[4] The answer and counterclaim of the Railroad Yardmasters of America appears at Record 109-124; the answer of the Great Northern Railway Company appears at Record 126-131, 142; the answer of the Southern Pacific Company appears at record 135-144, 150. The petitioners' reply to the counterclaim of the Railroad Yardmasters of America appears at Record 152; the counter-petitioners' reply to the answer and counterclaim of the carrier members of the First Division appears at Record 154-155.

[5] See Interstate Commerce Commission order, Ex. Parte 72 (R. 201, Intervenors Exhibit No. 5).

of such disputes to the First Division, or whether Congress intended to use the term "yard-service employees," as including only engineers, firemen, hostlers and outside hostler helpers, conductors, and trainmen in road or yard service, and grant exclusive jurisdiction of disputes involving yardmasters and other yard crafts to the Fourth Division, composed of maritime representatives.

A railroad yard is a system of tracks within defined limits, over which the movement of engines and cars not authorized by time table or train order may be made, subject to prescribed signals and rules or special instructions. A yard engine is an engine assigned to yard service and working within yard limits (R. 162).

The yardmaster has charge of the movement of trains and engines in a railroad yard (R. 162-169, 75-88). All trains and engines, and all employees performing yard work within yards are subject to his direction and control (R. 162-169). The yardmaster's principal duty is the supervision of such yard crafts or engineers, firemen, conductors, brakemen, flagmen, switchtenders, hostlers, yard helpers and others in the work of making up and breaking up, and switching trains within the yard. In short, the yardmaster is in charge of yard switching work.

The following excerpt from the Consolidated Code of Transportation Rules and General Instructions issued by the Great Northern Railway Company illustrates the yardmaster's duties (R. 167-168):

"970. Yardmasters report directly to Agents and obey instructions of Superintendent, Assistant Superintendents, Trainmasters, and Chief Dispatchers.

"971. They have charge of yards, of the men employed, the handling of trains and the movement of cars therein.

"972. It is their duty to see that the trainmen, enginemen and engines are ready for duty at the appointed times; that trains are properly made up (See

Rule 872), inspected and ready to leave on time and that doors of cars are properly secured.

"973. They must see that cars are not unnecessarily delayed in yards; that they are inspected and those needing heavy repairs are promptly sent to the shop or placed on repair tracks.

"974. They must see that all tracks are switched promptly and regularly; that transfer tracks with foreign lines are worked at the agreed upon time; that deliveries to industry, team and private tracks are made without delay and that repair and shop tracks are switched daily at the appointed times.

"They must insist on air hose being parted by hand and never permit them to be pulled apart.

"975. They must not permit a train to start or a yard engine to move with an engineman, conductor, yard foreman, or a brakeman connected with it who is under the influence of liquor or unfit for duty. They must report such cases promptly to the Agent and Superintendent.

"976. They must be familiar with the rules governing men in train service and the duties of all employees connected with freight trains; they must require the efficient discharge of such duties while in their yards and report violations of the rules coming to their notice.

"977. They will be held responsible for the proper position of switches. Main line switches in yards must be set and locked for main track except when in actual use. Inside switches except those on passing tracks may be left as used."

The District Court, in holding that yardmasters are not yard service employees, relied solely on the oral testimony of three railroad executives who testified for the respondents to the effect that within their own experience and knowledge the term "yard-service employees" did not include yardmasters. The meager oral testimony relied on to support the findings and conclusions of the District Court

appears in the testimony of the witness Theodore L. Green, his testimony being concurred in by respondents' witnesses Edmund G. Kiesele and Morris E. Sommerlott (R. 196, 197). Mr. Green testified as follows (R. 190-191):

"Q. Did you say when you began your railroad employment?

"A. March, 1902.

"Q. You have been continuously employed in railroad service since that time?

"A. Yes, sir.

"Q. During that period, will you state whether or not the term 'yard service employees' has had a certain meaning in the railroad field? I am not asking you to state what the meaning is; I am asking you if it has had a certain definite meaning?

"A. It refers to certain employees who make up and break up trains in yards within defined limits.

They also do other switching of cars, placing and pulling of cars at industries within those yards; namely, engineers, firemen, conductors or engine foremen, yard brakemen, switchmen or helpers, as they are termed.

"Q. Now, has it had that general meaning throughout the period *of your experience* and to your knowledge?

"A. Yes, sir.

"Q. Does the term *as you have defined it* include yardmasters?

"A. No, sir."

The basis of the decision of the District Court is indicated in its memorandum opinion wherein the court said (R. 226):

"Three witnesses testified ~~that among~~ railroad operatives the term yard service employee did not include

yardmasters. The *one* witness who testified for plaintiffs did not deny this. All he said was that 'they fit more nearly in with the yard service employees than any other class.' That certainly is not a statement they are members of that class. It implies that they are not, that they are not in any class mentioned in the statute but are more nearly related to the class of yard service employees than any other class. Clearly as to the direct evidence introduced on this subject *the preponderance* is against the plaintiffs."

In stating that there was no denial of the testimony of the respondents' witnesses by the petitioners' witness the District Court overlooked parts of the testimony and clearly erred. Mr. F. H. Nemitz, Senior Vice-President of the Order of Railway Conductors, testifyed for the petitioners under cross examination (R. 212-213):

"Q. * * * Let me ask you this, first: Can you agree with the witnesses who were on the stand this morning, at least to this extent, that in railroad parlance 'yard service employees' and 'yardmen' and 'yard crews' generally speaking mean the same thing?

"A. Yes, sir.

"Q. Now, you said you thought of yardmen, and that you understood the term to cover the people that worked within the yard, or within the switching limits, as I understood your statement?

"A. That is right, such as making up and breaking up of trains, switching, and so on.

"Q. In other words, I think you somewhat qualified that, didn't you? In other words, you are not telling the court that you think, for example, that these clerical people that work in the yards, or car checkers, the weightmasters, or clerks, you don't think of those as yardmen, do you?

"A. No, sir.

"Q. So that the terms 'yard service employees,' and

the equivalent terms, 'yardmen' and 'yard crews,' they don't include all of the men that work within the yard, or within the switching limits, do they?

"A. They would not include such as the storekeepers, or the section men, or perhaps other brakemen,* or clerks, and so on. Yardmen are usually men who have to do with the making up and breaking up of trains, switching in the yard, and supervising the work of the yardmen, *which would include, in my opinion, yardmasters and assistant yardmasters.*

"Q. Where you *differ* from the witnesses who testified this morning, I take it, is right at this point, that they say that the men who supervise that work that you have just referred to are not within the meaning of the terms, *whereas, you include the men who do the work, and also the men who supervise it; that is the difference between—*

"A. *I do.*"

The findings of the District Court are based *solely on the conflicting oral testimony.* Concluding that "the preponderance" of the oral evidence was against the petitioners, the District Court purported to find *an established and universal* "railroad usage" of the terms "yard service" and "yard-service employees" (R. 229-233). The court found that these terms described numerous crafts in yard work but that the yardmaster craft was not included among them. Specifically, the District Court found that the term "yard service employees" for many years has referred "*solely* to railroad employees engaged in making up and breaking up trains and switching trains within yard limits"; and that the term "yard service" denotes the work performed by such employees "who include engineers, firemen, conductors or engine foremen, yard brakemen or switchmen, and switchtenders." The crux of the findings of the District Court is contained in Finding No. 13 which reads (R. 233):

*This is evidently a misprint or error in transcription and should read "other trackmen."

> "*Railroad usage*, as evidenced *by the testimony* of experienced railroad officials and representatives of railroad employees, has *never* included yardmasters and assistant yardmasters within the meaning of the terms 'yard-service employees' or 'yard men', and yardmasters and assistant yardmasters have *never* been regarded as yard-service employees or yard men."

The memorandum opinion and the findings filed by the trial court disclose that its ultimate conclusions were predicated exclusively upon the oral testimony of respondents' witnesses, and that it did not give full consideration to the oral evidence, brushed aside the historic and legislative background of various voluntary boards of adjustment and their jurisdiction prior to the enactment of the amendments to the Railway Labor Act, the administrative construction of the Act by the Adjustment Board, documentary evidence of the meaning of the term "yard-service employees," attempts in Congress by the rail carriers to secure amendments expressly excluding yardmasters from the jurisdiction of the First Division, and ignored the intent of Congress as shown by the scheme and structure of the Act (R. 222-227, 229-234).

In accord with these findings and conclusions, the District Court entered judgment that the Fourth Division of the National Railroad Adjustment Board has exclusive jurisdiction to hear disputes involving yardmasters and assistant yardmasters employed by rail carriers; that the First Division of the Adjustment Board has no jurisdiction over such disputes (R. 234).

The Circuit Court of Appeals, in affirming the judgment of the District Court, likewise ignored and brushed aside the usual aids to congressional intent. It concluded that the oral testimony of the meaning of the term "yard-service employees" constituted "substantial evidence" in support of findings of Fact 7 through 13,[6] and that the definition

[6] The petitioners did not challenge Findings of Fact Nos. 1 through 6 on appeal to the Circuit Court (R. 244-246).

of the term involved a question of fact such as "bound" the Circuit Court. The Circuit Court then concluded that it followed *as a legal conclusion* that Congress intended to use the term "yard-service employees" in the sense that it was defined by the District Court under the preponderance of the evidence rule based on conflicting oral testimony (R. 271-279).

QUESTION PRESENTED

Does the First Division of the National Railroad Adjustment Board have jurisdiction over disputes involving railroad yardmasters within the meaning of Section 3, First (h) of the Railway Labor Act as amended.

SUMMARY OF ARGUMENT

The lower courts, on the basis of the oral testimony of three witnesses as to their opinion of the meaning of a term used in the Railway Labor Act, have assigned an interpretation to the Act:

1. Contrary to the historical fact that yardmasters have been aligned with the train and yard service crafts in the submission of their disputes to adjustment boards from the time of Federal control of the railroads in 1918 to the amendments to the Railway Labor Act in 1934, and the further fact that the First Division of the National Railroad Adjustment Board was patterned after the earlier voluntary boards of adjustment which heard such disputes and was designed by Congress to take over the work of these boards.

2. Contrary to the fact that the First Division of the National Railroad Adjustment Board took over the work of the regional boards which heard the disputes of train and yard service employees, including yardmasters, prior to 1934, and that the First Division of the Adjustment Board, composed of both carrier and labor members, heard disputes involving yardmasters until August 1, 1941, these

disputes being submitted to the First Division by both national rail employee organizations and the rail carriers.

3. Contrary to conclusive documentary evidence that experts in the rail industry have ordinarily used the terms "yard service" and "yard-service employees" to designate all yard crafts engaged in yard work, including the yardmaster craft, and that the term "yard-service employees" is commonly understood to include yardmasters both within and without the rail industry.

4. Contrary to documentary evidence that Congress in 1940 and again in 1941 refused to amend the Railway Labor Act so as to exclude yardmaster disputes from the jurisdiction of the First Division.

5. Contrary to the design and purpose of the Act to establish an Adjustment Board divided into four independent divisions, each division as nearly as possible being given jurisdiction over disputes involving employees in related lines of work.

The lower courts, petitioners respectfully submit, followed an erroneous and unprecedented course in arriving at the interpretation of the jurisdiction which Congress intended to confer in the several divisions of the Adjustment Board. Conflicting evidence or a "preponderance" of the evidence does not permit a finding of a universal and established trade use of a term, and particularly is this true when such a finding is based on the opinion testimony of three interested witnesses whose testimony is disputed, and is directly contrary to conclusive documentary evidence of the common understanding of the term within and without the industry. Findings of such universal and established usage are not supported by combing the record for some evidence on which they might be based, ignoring all other evidence to the contrary. Nor does the intent of Congress follow as a legal conclusion from a "definition" based solely on the findings of a purported "trade usage" drawn from conflicting oral testimony, and contrary to Congressional

intent as shown by other conclusive guides to Congressional intent.

Statutory construction requires that consideration and weight be given to every guide to congressional intent. As stated by this court in *United States vs. Dickerson*, 310 U. S. 554:

> "The meaning to be ascribed to an Act of Congress can only be derived from a considered weighing of every relevant aid to construction."

Petitioners respectfully submit that the so-called definition given the term "yard-service employees" is utterly at variance with the established and commonly understood use of the term within and without the rail industry, and whether it be historical background, administrative interpretation, "definition," Congressional refusal to amend the Railway Labor Act to exclude yardmaster disputes from the jurisdiction of the First Division, or statutory scheme and design, every available guide to Congressional intent points to the purpose of Congress to confer jurisdiction of disputes involving railroad yardmasters in the First Division of the Adjustment Board.

I

HISTORICAL BACKGROUND OF THE NATIONAL RAILROAD ADJUSTMENT BOARD

In establishing the National Railroad Adjustment Board by the 1934 amendments to the Railway Labor Act, Congress did not create a new administrative procedure for the settlement of railway labor disputes. As has been stated, "The National Railroad Adjustment Board, created by the Railway Labor Act of 1926 as amended on June 21,

1934, is not an entirely new piece of administrative machinery. It has its roots deep in the past."[1]

The long history of adjustment board procedure in the settlement of rail employer-employee disputes was fully considered by Congress in the enactment of the 1934 amendments to the Railway Labor Act. In the hearings on the 1934 amendments Mr. M. W. Clement, Chairman of the Committee on Railroads delegated to deal with the proposed amendments to the Railway Labor Act, in addressing the Senate Committee on Interstate Commerce, stated:[2]

> "*None of the things proposed in this bill is new.* We have had national boards, both in the boards of adjustment during the Government administration of railroads and in the United States Labor Board. We have had regional boards. We have had system boards. We have had Presidents' emergency boards, and we have had arbitration boards."

Throughout the Senate and House Committee Hearings on the 1934 amendments to the Railway Labor Act, frequent reference was made to the national boards of adjustment established during the period of Federal control of the railroads in 1918 under the United States Railroad Administration.[3] As recognized by the National Mediation Board in its First Annual Report:[4]

> "The orders, policies, and practices of the railroad administration laid the basis for many of the provisions later embodied in the Railway Labor Act."

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[1] Spencer, *The National Railroad Adjustment Board* (1938), at page 151 of the Appendix to *Inquiry of the Attorney General's Committee on Administrative Procedure Relating to the National Railroad Adjustment Board.*

[2] *Hearings Before the Committee on Interstate Commerce, United States Senate,* 73rd Congress, Second Session on S. 3266, a Bill to Amend the Railway Labor Act, at page 67.

[3] See pages 15, 17, 19, 28, 30, 33, 34, 67 of the *Hearings Before the Committee on Interstate Commerce, United States Senate,* 73rd Congress, Second Session on S. 3266; and see pages 45, 47, 80, 81 of the *Hearings Before the Committee on Interstate and Foreign Commerce, House of Representatives,* 73rd Congress, Second Session on H. R. 7650.

[4] *First Annual Report of the National Mediation Board Including the Report of the National Railroad Adjustment Board* (For the Fiscal Year Ended June 30, 1935) at page 63, Library of Congress, Washington, D. C.

Likewise, Congress was thoroughly familiar with the four voluntary regional boards of adjustment which were created after the period of Federal control of the railroads to hear and determine the disputes of train and yard service employees, including yardmasters, and which functioned up to the time of the 1934 amendments to the Railway Labor Act.[5]

Recognition was further given to these historical antecedents of the National Railroad Adjustment Board by the statement in the Senate Hearings on the 1934 amendments that:

> "The bill is designed to maintain *substantially the same method* as is now provided in the railway labor act for the adjustment of labor relations between the railroads and the employees."[6]

Notwithstanding that the National Railroad Adjustment Board established by the 1934 amendments to the Railway Labor Act is not a new piece of administrative machinery but simply the legislative pattern of voluntary boards of adjustment which had existed for many years, the lower courts erroneously concluded that the historical background of the Adjustment Board was "not helpful in determining the question" (R. 227, 277).

National Boards for the settlement of rail employee disputes were created and functioned for the first time during the period of Federal control of the railroads in World War I. In 1918 the Director General of Railroads established three national boards of adjustment known as Railroad Board of Adjustment No. 1,[7] Railroad Board of

[5] Senate Hearings at pages 15, 33 and 67; House Hearings at pages 45 and 81.

[6] Statement of George M. Harrison, Chairman of the Legislative Committee of the Railway Labor Executives Association speaking for the 21 standard railway labor organizations which sponsored the 1934 amendments to the Railway Labor Act at page 28 of the Senate Hearings on S. 3266.

[7] General Order No. 13, issued by the Director General of Railroads on March 22, 1918, is set forth in the *Inquiry of the Attorney General's Committee on Administrative Procedure Relating to the National Railroad Adjustment Board*, Book two, Appendix page 19-22.

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Adjustment No. 2,[8] and Railroad Board of Adjustment No. 3.[9]

The general orders of the Director-General of Railroads establishing these three national boards of adjustment are substantially identical in terminology. All three boards were bipartisan and composed of an equal number of representatives selected by the Carriers and by the rail brotherhoods. Each board was given jurisdiction over "all controversies growing out of the interpretation or application of the provisions of the wage schedules or agreements which are not promptly adjusted by the officials and the employees on any one of the railroads operated by the government * * *."[10]

Railroad Board of Adjustment No. 1 was composed of eight members, four of whom were selected by the regional directors of the railroads and four by the following rail brotherhoods: Brotherhood of Locomotive Engineers, Order of Railway Conductors, Brotherhood of Railroad Trainmen, Brotherhood of Locomotive Firemen and Enginemen. This Board heard the disputes of *train and yard service*

[8] General Order No. 29, issued by the Director General of Railroads on May 31, 1918, is set out in the Attorney General's Inquiry in Book two, Appendix page 23-26.

[9] General Order No. 53, issued by the Director General on November 12, 1918, is set out in the Inquiry of the Attorney General's Committee, Book two, Appendix page 27-30.

[10] See General Orders No. 13, 29 and 53 (referred to at footnotes 7, 8 and 9). Each of these Orders incorporated an agreement between the carriers and the national labor organizations which provided in part:

"Personal grievances or controversies arising under interpretation of wage agreements, and all other disputes arising between officials of a railroad and its employees, covered by this understanding, *will be handled in their usual manner* by general committee of the employees *up to and including the chief operating officer of the railroad* (or someone officially designated by him), when, if an agreement is not reached, the chairman of the general committee of employees may refer the matter to the chief executive officer of the organization concerned, and if the contention of the employees' committee is approved by such executive officer, then the chief operating officer of the railroad and the chief executive officer of the organization concerned shall refer the matter, with all supporting papers; to the Director of the Division of Labor of the United States Railroad Administration, who will in turn present the case to the Railway Board of Adjustment No. 1, which Board shall promptly hear and decide the case, *giving due notice to the chief operating officer of the railroad interested and to the chief executive officer of the organization concerned of the time set for hearing.*"

employees, including yardmasters. (R. 206-207, Plaintiffs' Exhibits A and B).

Railway Board of Adjustment No. 2 was composed of twelve members, 6 of whom were selected by the regional directors of the railroads and 6 by the following rail brotherhoods representing shop craft employees: International Association of Machinists; International Association of Boilermakers, Iron Shipbuilders and Helpers of America; International Brotherhood of Blacksmiths and Helpers; Brotherhood of Railway Carmen of America; Amalgamated Sheet Metal Workers International Alliance; International Brotherhood of Electrical Workers.

Railway Board of Adjustment No. 3 was composed of eight members, four selected by the regional directors of the railroads and four by the following organizations: Order of Railway Telegraphers; Brotherhood of Railway Clerks; Switchmen's Union of North America; United Brotherhood of Maintenance of Way Employees and Railroad Shop Laborers. The Switchmen's Union represents yard-service employees, including yardmasters, and the disputes of employees represented by this craft were transferred to the First Division of the National Railroad Adjustment Board by the 1934 Amendments.

Because it was not practicable to create adjustment boards for unorganized employees and the small organizations, the United States Railroad Administration issued circular No. 3 on August 30, 1918, directing these employees to submit their disputes to the director of the Division of Labor.[11]

With the end of Federal control of the railroads, boards of adjustment on a national basis were terminated. The Transportation Act, effective February 28, 1920, provided in Section 302 as follows:[12]

[11] *Inquiry of the Attorney General's Committee on Administrative Procedure Relating to the National Railroad Adjustment Board*, Book 2, Appendix page 30-32.

[12] C. 91, 41 Stat. 456; *Inquiry of the Attorney General's Committee on Administrative Procedure Relating to the National Railroad Adjustment Board*, Book 2, Appendix page 33-39.

"Railroad boards of adjustment may be established by agreement between any carrier, group of carriers, or the carriers as a whole, and any employees or subordinate officials of carriers, or organization or group of organizations thereof." [13]

Section 304 of the Transportation Act also established the Railroad Labor Board, a tripartite board composed of representatives of management, labor and the public. Section 307 of the Transportation Act provided that this board should have jurisdiction of disputes in which any adjustment board "failed or will fail to reach a decision within a reasonable time." It was further provided that in case the appropriate adjustment board was not organized the labor board, under certain circumstances, should hear and decide disputes involving rules or working conditions.

Under the Transportation Act of 1920, the national rail organizations representing train and yard service employees were successful in establishing regional boards of adjustment. Insofar as train and yard service employees were concerned, these regional boards were patterned after and continued the function of Railroad Board of Adjustment No. 1. By agreements executed in 1921 between certain rail carriers and the Brotherhood of Locomotive Engineers, Brotherhood of Locomotive Firemen and Enginemen, Order of Railway Conductors and the Brother-

[13] Under the Transportation Act of 1920 Boards of Adjustment were not generally established. Because of the success of the National Adjustment Boards under the United States Railroad Administration, the employees wanted national adjustment boards. The carriers objected to national adjustment boards preferring system boards. The history of this period is stated by Johnson in *Government Regulation of Transportation* as follows:

"The purpose of the statute (Transportation Act of 1920) was to have disputes or disagreements as to working conditions reach the National Railroad Labor Board only upon appeal from a decision of a regional or national adjustment board; but the statute did not work out in practice as had been planned. The adjustment boards were not established. What the railway unions wanted was the continuance of the national agreements that they had secured during the favorable period of government operation, while the carriers did not favor the establishment of adjustment boards composed only of representatives of the employees and the carriers." Johnson, *Government Regulation of Transportation*, (1938) at page 187; See also Wolf, *The Railroad Labor Board*, (1927) at pages 52-55.

hood of Railroad Trainmen, representing train and yard service employees, three regional boards of adjustment were created, known as the Train Service Board of Adjustment for the Southeastern Region, the Train Service Board of Adjustment for the Western Region, and the Train Service Board of Adjustment (Eastern).[14]

These three boards heard the disputes of *train and yard service employees, including yardmasters* (R. 207-109).[15]

Title 3 of the Transportation Act of 1920 was repealed by the Railway Labor Act of 1926 which provided in Section 3 as follows:[16]

> "Boards of adjustment shall be created by agreement between any carrier or group of carriers, or the carriers as a whole, and its or their employees."

The three regional boards referred to above which were created to hear the disputes of train and yard service employees continued to function under the Railway Labor Act of 1926. In addition, certain carriers and the four rail brotherhoods representing train and yard service employees by agreement dated April 4, 1928, established a fourth board known as the "Southwestern Regional Train Service Board of Adjustment."[17]

This board also heard the disputes of *train and yard service employees, including yardmaster disputes* (R. 208).[18]

The history of adjustment boards beginning with the end of Federal control to the enactment of the amendments to the Railway Labor Act in 1934 is one of struggle on the part of the rail unions to establish national adjustment boards patterned after the boards established under Fed-

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[14] *Inquiry of Attorney General's Committee on Administrative Procedure Relating to the National Railroad Adjustment Board*, Book 2, Appendix pages 39-56.

[15] Identified as Plaintiffs' Exhibits D, G, F, and J.

[16] C. 347, S. 3, 44 Stat. 578, 45 U. S. C. A. Section 153 (Historical note); *Inquiry of Attorney General's Committee*, Appendix page 62-73.

[17] *Inquiry of Attorney General's Committee*, Appendix page 57-61.

[18] Identified as plaintiffs' Exhibits H and I.

eral control.[19] The rail brotherhoods representing train and yard service employees, however, were able to obtain the establishment of regional boards of adjustment patterned after Railroad Board of Adjustment No. 1 established during the period of the United States railroad administration. And throughout this period the *disputes of yardmasters* were heard *along with* the disputes of the other train and yard service employees represented by the four operating brotherhoods.

A comparison of the First Division of the National Railroad Adjustment Board with Railroad Adjustment Board No. 1 created during the period of Federal control of the railroads in 1918, and the regional boards of adjustment which followed it, must establish beyond dispute that in designating the craft jurisdiction of the First Division Congress *intended* to and did follow the *pattern* of the earlier boards so as to group within the First Division the train and yard service employees, generally known as the operating crafts, which include the yardmaster craft.[20]

The alignment of crafts was not changed from that prevailing in the period of Federal control. The First Division which hears the disputes of train and yard service employees is identical to Railroad Adjustment Board No. 1, and the four regional boards which followed it, the only change being that *all* the train and yard service employees, irrespective of union affiliation, are under the jurisdiction of the First Division. The Second Division hears the disputes of the shop craft employees as did Railroad Board of Adjustment No. 2 in the period of Federal control. The

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[19] Fisher, *Industrial Disputes and Federal Legislation* (1940); Johnson, *Government Regulation of Transportation* (1938); Wolfe, *Railroad Labor Board* (1927); Alderman, *The History of Federal Legislation: Hearings Before the Committee on Interstate Commerce*, United States Senate on S. 3266, at pages 15, 30 and 67; *Hearings before the Committee on Interstate and Foreign Commerce*, House of Representatives on H. R. 7650, pages 45, 80.

[20] "The orders, policies, and practices of the Railroad Administration laid the basis for many of the provisions later embodied in the Railway Labor Act." *First Annual Report of the National Mediation Board* for the Fiscal Year ended June 30, 1935, at page 63; See also the statement that the Railway Labor Act "borrowed freely from the phraseology" of General Order 13 at page 358 of the *Inquiry of the Attorney General's Committee*.

Third Division hears the disputes of telegraphers, clerks and maintenance of way employees as did Railroad Board of Adjustment No. 3 under Federal control and in addition there has been added train dispatchers, freight handlers, station and store employees, signalmen, sleeping car conductors, sleeping car porters and maids and dining car employees.

Yardmasters have submitted their disputes to boards which heard disputes of train and yard craft employees for many years and there is not a scintilla of evidence in the Congressional Hearings to indicate that Congress intended to exclude them from the jurisdiction of the First Division of the Adjustment Board.

The 1934 amendments to the Railway Labor Act which created the National Railroad Adjustment Board to function in four independent divisions were sponsored by the Railway Labor Executives Association composed of 21 standard rail organizations.[21] The enumeration of crafts in the first three divisions of the National Railroad Adjustment Board was undoubtedly intended to encompass the crafts represented by the rail organizations. However, the 1934 amendments fixed the jurisdiction of the several Divisions of the Adjustment Board by craft designation rather than by union affiliation in order that *all* employees within these craft designations could have their grievances presented to a division of the adjustment board.[22]

Upon the establishment of the National Railroad Adjustment Board, the First Division had no difficulty in determining its jurisdiction of train and yard service employees, including yardmasters.[23] In its first report to Congress the Board stated:[24]

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[21] *Hearings Before the Committee on Interstate Commerce, United States Senate*, page 27; *Hearings Before the Committee on Interstate and Foreign Commerce, House of Representatives*, page 77.

[22] *Hearings Before the Committee on Interstate and Foreign Commerce*, House of Representatives, page 83.

[23] The First Division of the Adjustment Board has heard and entered awards in the disputes of the following rail crafts: engineer, helper engineer, firemen, conductor, assistant conductor, ticket collector, pilot, brakemen, flagmen, baggagemen, general yardmaster, assistant yardmaster, yardmaster,

"Award No. 4150, so far as Long is concerned, removed him from the second trick assignment, (of assistant yardmaster) as he was permitted to take same contrary to the agreement. This would restore Long's status on the third trick assignment the same as though he had not taken the second trick assignment."

According to the jurisdictional distinction drawn by the Circuit Court of Appeals, Assistant Yardmaster Long could complain to the Fourth Division and have the entire issue of his re-assignment redetermined by that Division. Hairline distinctions creating jurisdictional conflicts of this nature were never intended by Congress in defining the jurisdiction of the divisions of the Adjustment Board. Obviously all awards involving yardmasters and their rights to hold a yardmaster assignment "involve yardmasters" even though the claim may be submitted on behalf of some other yard employee claiming seniority to the position in opposition to the yardmaster incumbent.

Included also in the 19 awards are Awards Nos. 2364, 2490, 3609, 3610, 4548 and 4584.[13] Generally, these awards involve claims that yard employees have not been assigned to yardmaster positions or to work as extra yardmasters on relief days in accord with the seniority rules of collective agreements.

Fourth, the conclusion of the Circuit Court that the assumption of jurisdiction of yardmaster disputes by the First Division had been inadvertent is clearly erroneous. Prior to 1938, the members of the First Division appear to have been in complete agreement as to the jurisdiction of that Division to hear yardmaster cases.[14] More-

[13] R. 210, Plaintiffs' Exhibit K.

[14] See Award No. 1274, decided July 13, 1935; Award No. 1603, decided December 14, 1936; Award Nos. 1648 and 1649, decided January 21, 1937; and Award Nos. 1896 and 1897, decided April 14, 1937. (R. 210, Plaintiffs' Exhibit K). While a referee was appointed for some of these cases, there is no indication that the Board was divided on any question other than the merits of the decision. And the First Division asserted that it had taken over the work of the four regional boards, *all of which heard yardmaster disputes.* See 1935 Annual Report at page 46.

over, the jurisdictional question, if any, could not have been merely ignored or overlooked by the First Division in view of the deadlock among the members of the Fourth Division on this question, this deadlock being *reported in the 1936, 1937 and 1938 Annual Reports of the Adjustment Board.*[15]

Actually the question of the jurisdiction of the First Division over cases involving railroad yardmasters was fully argued by the members of that Division. On March 1, 1938, the carrier members of the First Division submitted a brief,[16] to the Honorable Frank M. Swacker, referee sitting with the First Division, with copies to the labor members of that Division, contending that the First Division did not have jurisdiction of yardmaster disputes. The brief of the carrier members was submitted in consideration of Dockets 1198, 4503, 4504 and 4505 then pending before the First Division. Docket 1198 (Award No. 2710) concerned the claim of a yardmaster complaining of wrongful displacement;[17] Docket 4503 (Award No. 2711),[18] and Docket 4504 (Award No. 2712)[19] involve claims of yardmasters alleging wrongful discharge. Docket 4505 (Award No. 2713)[20] involves the claim of a yardmaster for wrongful displacement.

In their brief to Referee Swacker, the carrier members stated:

"The undersigned members of the National Railroad

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[15] See page 46 of the 1936 Annual Report, page 34 of the 1937 Annual Report, and page 46 of the 1938 Annual Report of the Adjustment Board.

[16] By stipulation of petitioners and respondents, filed with the Clerk of this Court, the parties have agreed that this document may be referred to as part of the record in this cause. The brief of the carrier members of March 1, 1938, is accompanied by the affidavit of R. A. Knoff, carrier member of the First Division, this affidavit being dated October 14, 1945. This document was submitted to the Circuit Court by the respondents at the time of oral argument.

[17] This Award was not introduced as an Exhibit by either party in this cause but is contained in the published Awards of the First Division, Library of Congress, Washington, D. C., and for the convenience of the court it is set forth in Appendix III of this brief.

[18] Not introduced as an Exhibit but contained in the published Awards of the First Division. This award relates to the same circumstances as those before the First Division in Award No. 2712 (R. 75-88).

[19] R. 75-88, Plaintiffs' Exhibit G.

[20] R. 210, Plaintiffs' Exhibit K.

"The First Division of the National Railroad Adjustment Board *took over the work of the four regional boards*, adding thereto representation of many railroads not parties to any of the regional boards, and adding, also, the Switchmen's Union of North America as a party to the First Division.

The abolition of these four regional boards left, pending and unadjusted, approximately 1,200 cases for the First Division, which cases had to be revamped to conform reasonably to the requirements of this Division, and submitted to it."

As noted heretofore, the work of the four regional boards consisted of hearing and deciding disputes of train and yard service employees, *including the disputes of yardmasters* (R. 207-209).[25]

Obviously at the time of the 1934 amendments to the Railway Labor Act, those familiar with the background of these amendments and their purpose and who were charged with placing them in operation understood and recognized that yardmaster disputes were properly cognizable in the First Division of the Adjustment Board.

Notwithstanding the relevance of these facts in interpreting the intent of Congress on the question in dispute, the lower courts stated that the historical background of the First Division of the Adjustment Board was "not helpful in determining the question" (R. 227, 277). This erroneous conclusion is based on the fact that during the period of Federal control of the railroads and the period of the regional boards of adjustment preceding the establishment of the National Railroad Adjustment Board, a

night yardmaster, footboard yardmaster, yard conductor, yard foremen, yard helper, yard brakemen, switchtender, engine herder, car retarder operator, hostler, hostler helper, outside hostler, inside hostler, engine watchmen and engine messenger. See published awards of the First Division of the National Railroad Adjustment Board and Index thereto, Library of Congress, Washington, D. C.

[24] *First Annual Report of the National Mediation Board Including the Report of the National Railroad Adjustment Board* (For the Fiscal Year Ended June 30, 1935) at page 16.

[25] Identified as plaintiffs' Exhibits E, F, G, H, I and J.

few train and yard service employees did not submit their disputes to these earlier boards of adjustment because these employees were not members of and were not directly represented by the four national rail organizations which represent the great majority of the employees in the operating crafts.

Just how this fact *completely destroys* the value of the historical background of the Railway Labor Act as a factor in determining the intent of Congress is not explained. Clearly, even though the lower courts felt that an examination of the historical background of the Act did not *conclusively* settle the issue, certainly it was relevant and persuasive as to Congressional intent and not to be dismissed *entirely* as "not helpful in determining the question."

Congress must be presumed to have been familiar with the past history of the former adjustment boards and the fact that yardmaster disputes had been heard by these boards along with the disputes of the other train and yard service operating crafts. If Congress had intended to narrow and circumscribe the jurisdiction of the First Division so as to exclude yardmaster disputes, it would have been easy to use apt language declaratory of its purpose. It is inconceivable that Congress used the general term "yard-service employees," commonly understood to include yardmasters as well as all other yard operating crafts, with the intent that yardmasters were to be segregated from their historical setting and their disputes excluded from the jurisdiction of the First Division so as to fall to the Fourth Division composed of marine representatives.

Petitioners submit that the lower courts erred in their consideration of the historical background of the Railway Labor Act.

This court has repeatedly emphasized that in the determination of the construction to be placed on an act of Congress, reference must be made to the history of the times in which the Act was passed. *United States vs. American Trucking Associations*, 310 U. S. 534; *Helvering vs. New*

York Trust Company, 292 U. S. 454; *Norwegian Nitrogen Products Company vs. United States*, 288 U. S. 294; *Great Northern Railway Company vs. United States*, 315 U. S. 262.

In the case last cited, this court said:

> "But we are not limited to the lifeless words of the statute and formalistic canons of construction in our search for the intent of Congress. The Act was the product of a period, and, 'courts, in construing a statute, may with propriety refer to the history of the times when it was passed'."

As stated by Judge Howe in *The Penza*, 2nd Cir., 9 Fed. 2d. 527:

> "It is always assumed that statutes are passed in the light of, and with reference to pre-existing law * * *."

II.

ADMINISTRATIVE INTERPRETATION OF THE JURISDICTION OF THE FIRST DIVISION

Following the enactment of the 1934 amendments to the Railway Labor Act, the carrier and labor members of the First Division of the Adjustment Board, all expert in the rail industry and familiar with the past history of adjustment boards, assumed jurisdiction of disputes involving train and yard-service employees, including yardmasters.[1]

In common recognition of the jurisdiction of the First Division, *both the rail carriers and the rail labor organizations joined in submitting disputes involving yardmasters*

[1] *First Annual Report of the National Mediation Board Including the Report of the National Railroad Adjustment Board* (For the Fiscal Year Ended June 30, 1938) at pages 46 and 51.

to the First Division (R. 210, Plaintiffs' Exhibit K). The Railroad Yardmasters of America, however, declined to accept the jurisdiction of the First Division over yardmaster disputes and submitted several such disputes to the Fourth Division, composed of representatives of carriers directly or indirectly engaged in transportation by water and representatives of labor organizations representing marine employees. The Fourth Division promptly deadlocked on the question of divisional jurisdiction over disputes involving yardmasters (R. 231),[2] and remained deadlocked until the collusive decree in Chancery No. 16031 was entered on July 11, 1938 (R. 231).[3] Yardmaster cases were heard and decided by the Fourth Division for the first time *following the entry of the decree in Chancery No. 16031 and under its compulsion* (R. 231).

In spite of the situation prevailing in the Fourth Division of the Adjustment Board, the First Division, composed of rail experts, heard and decided disputes involving yardmasters, both *before* and *subsequent* to the entry of Decree in Chancery No. 16031, and continued to hear such disputes until August, 1941 (R. 231).

The District Court, in failing to give weight to the administrative construction of the Railway Labor Act by the First Division of the Adjustment Board, indicated a misunderstanding of the facts. In its opinion the District Court stated (R. 227):

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[2] The *Second Annual Report of the National Mediation Board Including the Report of the National Railroad Adjustment Board* (For the Fiscal Year Ended June 30, 1936) at page 46, reports the deadlock of the Fourth Division on the question of divisional jurisdiction of a dispute submitted to it by the Railroad Yardmasters of America. Likewise, in the Third and Fourth Annual Reports of the Adjustment Board for the fiscal years ended June 30, 1937, and June 30, 1938, at pages 34 and 46, respectively, the Fourth Division reported the deadlock of that Division on the question of divisional jurisdiction of cases involving railroad yardmasters.

[3] While the Fourth Annual Report of the Adjustment Board for the fiscal year ended June 30, 1938, reflects the continuing deadlock of the Fourth Division on the question of the jurisdiction of that Division to hear yardmaster cases, (see page 46) subsequent Annual Reports, beginning with the Report of June 30, 1939, reflect the determination of yardmaster cases by the Fourth Division.

"Prior to the decision of this court in Case 16031 several disputes involving yardmasters had been heard and determined by the first division. *That fact might be quite persuasive as to the meaning to be given the term yardmasters were it not that the fourth division had also heard and determined certain such cases.* Each Division seemed to be of the opinion that it had jurisdiction of such disputes."

The trial court recognized one of the cardinal rules of statutory interpretation when it indicated that the conceded fact that the First Division had heard disputes involving yardmasters prior to August, 1941, was quite persuasive of the intent of Congress. The quotation from the opinion above set forth demonstrates that the court would have reached an entirely different conclusion than it did except for the *erroneous assumption* that the Fourth Division, *before* the default Decree in Chancery No. 16031, *had also* considered and decided cases involving yardmasters. This assumption is directly contrary to the record. The record is undisputed that *before* the collusive decree in Chancery 16031, the Fourth Division had never accepted or decided a case involving a railroad yardmaster!

Obviously, if the First Division, composed of ten *rail* experts designated by the carriers and by the national rail operating brotherhoods, assumed jurisdiction and heard yardmaster cases, that fact must have great weight in the determination of the meaning of the term "yard-service employees" as used by Congress.

In considering this issue the Circuit Court referred to 19 awards of the First Division submitted in evidence by the petitioners, all of which will be found under the heading "yard service," subheading "yardmasters," in the Index to the decisions of the First Division. The 19 decisions are Award Nos. 1274, 1603, 1648, 1649, 1896, 1897, 2364, 2490, 2491, 2712, 2713, 2970, 3609, 3610, 4077, 4117, 4150, 4548 and 4584. These awards are identified as Plaintiffs' Exhibit K (R. 210), except Awards 4077, 4150 and 2712 which are Ex-

hibits E, F, and G, respectively, attached to plaintiffs' petition (R. 37, 52, 75).

The Circuit Court was of the opinion that of these 19 awards by the First Division only three cases, involving yardmasters complaining of wrongful demotion, discharge, or displacement, "relate to disputes involving yardmasters in the proper sense of that term" (R. 277).

As to these 19 awards by the First Division, the Circuit Court further stated (R. 277):

> "In none of these awards was there *any discussion* of the jurisdictional question depending upon the interpretation of 'yard-service employees.' The award *merely recited*, as in all awards: 'This Division of the Adjustment Board has jurisdiction over the dispute involved herein.'
>
> "Whenever the question involved in this case has been given *specific attention*, the First Division has deadlocked. The labor members wished to accept yardmaster cases, and carrier members refused."

The petitioners submit that the Circuit Court erred in its conclusions in at least four respects.

First, it is inconceivable that a court may impeach a jurisdictional finding of a division of the Adjustment Board by *speculation* that for lack of discussion in the printed award the jurisdictional finding was probably inadvertent and made without the "specific attention" of the Board to the question of its jurisdiction over the dispute. In view of the distribution of jurisdiction among the several divisions of the Adjustment Board the question of jurisdiction is an ever present one. It is necessarily in the minds of both the organization and the carrier in the submission of every case to the Adjustment Board. Likewise, in a bipartisan board, composed of representatives of both parties, alert to challenge the respective positions of the other party in each case, it is inconceivable that the ten rail members of the First Division would make any jurisdictional finding

inadvertently or without a question being raised concerning the issue, if any doubt existed in the mind of any of the members.

Second, the Circuit Court's conclusion that there had been *only three cases* "involving yardmasters" is utterly erroneous. The respondents in their brief to the Circuit Court admitted that Award 1649 (yardmaster complaining of wrongful demotion),[4] Award 1896 (yardmasters complaining of wrongful displacement),[5] Award 2712 (yardmaster complaining of wrongful discharge),[6] Award 2713 (yardmaster complaining of wrongful displacement),[7] and Award 4117 (yardmaster claiming rate of pay under one agreement rather than another),[8] were unquestionably "yardmaster cases." Aside from these cases, Award No. 2970 ruled on a yardmaster complaint concerning claims for overtime;[9] Award 2710 of the First Division (set out in Appendix III of this brief) concerns the complaint of a night yardmaster of wrongful displacement; and Award 2711[10] of the First Division also determined the claim of an assistant yardmaster of wrongful discharge. Even by the narrow jurisdictional interpretation of the Circuit Court, these eight cases are decisions "involving" yardmasters, and, as will be noted hereafter, the members of the First Division gave specific attention to the jurisdictional question.

Third, the Circuit Court's conclusion that the only cases which relate to disputes "involving" yardmasters decided by the First Division are those in which the complaint is filed on behalf of a yardmaster is likewise erroneous. Certain disputes submitted to the First Division of the Ad-

[4] R. 210, Plaintiffs' Exhibit K.
[5] R. 210, Plaintiffs' Exhibit K.
[6] R. 75, Exhibit G, attached to Plaintiffs' petition.
[7] R. 210, Plaintiffs' Exhibit K.
[8] R. 210, Plaintiffs' Exhibit K.
[9] R. 210, Plaintiffs' Exhibit K.
[10] Awards 2710 and 2711 were not introduced as exhibits but are contained in the published awards of the First Division of the National Railroad Adjustment Board in the Library of Congress, Washington, D. C., and are referred to in the brief of the carrier members to Referee Frank M. Swacker of March 1, 1938, to which reference is made by stipulation of the parties filed in this court.

justment Board involved yardmasters by reason of seniority questions concerning rights of appointment to the yardmaster position. In this type of case an employee, generally a yard foreman or switchman, complained that the carrier violated seniority rules in an appointment to a yardmaster vacancy occurring in the yardmaster position in the yard. In such cases the carrier defended the rights of the yardmaster incumbent to the position and the First Division of the Adjustment Board determined the respective rights of the yardmaster incumbent, appointed by the carrier, and the claimant to the position. Where the Adjustment Board sustained the claimant's right to the yardmaster position the Board necessarily ruled that the yardmaster incumbent was not entitled to the position and was improperly appointed to the position in violation of seniority rules. The carrier, to carry the award into effect, necessarily displaced the yardmaster incumbent by the successful claimant.

Illustrative of such cases are Awards Nos. 1274, 1603, 1648, 1897, 2491, 4077 and 4150 in which yard employees claimed a violation of seniority rules in the appointment of yardmasters.[11] All of these awards involve *conflicting claims* to a yardmaster position by the yardmaster incumbent and some other yard employee. For instance, in Award 4150 (R. 52-74) the carrier had assigned one F. H. Long, employed as an assistant yardmaster on the 11:00 P.M. shift (or third trick) as assistant yardmaster on the 3:00 P.M. shift (or second trick). One C. E. Halbrook, employed as a switchman, contended that he was senior to Long and entitled to the appointment of assistant yardmaster on the 3:00 P.M. shift. The Board sustained switchman Halbrook's claim.

In interpreting the decision in Award No. 4150, the First Division in Award 6293 stated:[12]

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[11] Awards Nos. 1274, 1603, 1648, 1897 and 2491 appear in Plaintiffs' Exhibit K, R. 210; Award 4077 appears at R. 37-52; and Award 4150 appears at R. 52-74.

[12] Award No. 6293 is not an exhibit in the record but is published in the awards of First Division of Adjustment Board, Library of Congress, Washington, D. C.

> Adjustment Board—First Division, beg leave to submit that the basic issue between the membership of this division *is a dispute as to which of two Divisions of the National Railroad Adjustment Board, i.e., the First or Fourth Division, has jurisdiction over yardmasters*, the class of employees involved in Docket Nos. 1198, 4503, 4504 and 4505, and to avoid any misunderstanding about the issue please let it be clearly understood that insofar as we are concerned, no formal discussion having been had, no disagreement exists over the making of an award on the merits of these four dockets. *The sole discussion had thus far has resolved itself into a disagreement over the question of which division has jurisdiction over yardmasters.* We contend the amended Act expressly confers upon the Fourth Division jurisdiction over disputes that arise between the carriers and yardmasters."

It is significant that while the carrier members of the First Division questioned the jurisdiction of that Division over yardmaster disputes, it did not occur to the rail carriers who were parties to the yardmaster disputes in Docket Nos. 1198, 4503, 4504 and 4505, to raise this contention. In fact, the carriers *joined* with the organizations in submitting these disputes to the First Division.

The carrier members of the First Division, whether or not convinced in *private* discussion that their position was without merit, entered no *public* protest or dissent of record and in each of the cases in the published Awards Nos. 2710 (Docket 1198), 2711 (Docket 4503), 2712 (Docket 4504), and 2713 (Docket 4505), all decided March 31, 1938, a finding of jurisdiction purportedly made by the entire First Division was entered as follows:

> "This Division of the Adjustment Board has jurisdiction over the dispute involved herein."

In making this finding there can be no question but that it and similar findings in other yardmaster cases had the

full consideration of the entire membership of the First Division of the Adjustment Board.

Following the decisions in Awards Nos. 2710, 2711, 2712 and 2713, on March 31, 1938, the collusive Decree in Chancery 16031 was entered on July 11, 1938, which ordered and compelled the Fourth Division to assume jurisdiction and hear and determine yardmaster disputes. (R. 177-181, 231). Notwithstanding this fact, the First Division continued to assert jurisdiction and hear and determine cases involving yardmasters after July 11, 1938. See Award Nos. 2970, 3609, 3610, 4117, 4548 (R. 210, plaintiffs' Exhibit K), Award No. 4077 (R. 37-52) and Award No. 4150 (R. 52-74).[21] It was not until August 28, 1941, that the carrier members of the First Division resurrected the collusive decree in Chancery 16031 as a reason for their assertion that they would not agree to set down or participate in the hearing of yardmaster cases. (R. 186-188, 230-231).

Summarizing the actions of the Adjustment Board, the following facts appear of record:

1. Following the establishment of the National Railroad Adjustment Board by the 1934 amendments to the Railway Labor Act, the First Division of the Board assumed the work of the four regional Boards, taking over the accumulation of cases before the regional Boards, including disputes involving yardmasters. Subsequently jurisdiction in disputes involving yardmasters was repeatedly asserted in the published Awards of the First Division and such disputes were heard and decided by the First Division until August, 1941, when the carrier members refused to docket such cases for hearing on the sole basis that Chancery Decree 16031 had confirmed jurisdiction in such cases in the Fourth Division (R. 230-231, 186-198).

2. The Fourth Division assumed jurisdiction over yardmaster disputes only following the order of Decree in Chan-

[21] See also Awards Nos. 3383 and 4078 in the published Awards of the First Division, Library of Congress, Washington, D. C.

cery 16031 on July 12, 1938, and under its compulsion (R. 231).

3. With the enactment of the 1934 amendments to the Railway Labor Act, the rail labor organizations, the rail carriers and the members of the First Division of the Adjustment Board were in agreement that yardmaster disputes were within the jurisdiction of the First Division. The first disagreement, other than the jurisdictional deadlock in the Fourth Division precipitated by the Railroad Yardmasters of America, appears to have occurred in the course of private discussion among the members of the First Division in connection with the determination of the cases in Dockets 1198, 4503, 4504 and 4505. Nevertheless, the published Awards of the First Division contained a finding of jurisdiction in that Division in these cases and other yardmaster cases and the First Division continued to hear and determine yardmaster disputes until August, 1941 (R. 230-231, 210 Plaintiffs' Exhibit K).

4. Prior to 1938, no carrier protested the jurisdiction of the First Division over yardmaster cases. In fact, the carriers joined with the labor organizations in submitting such cases to the First Division. Subsequent to Decree in Chancery No. 16031 on July 11, 1938, the question of the jurisdiction of the First Division in yardmaster cases has been raised only sporadically by the carriers in yardmaster disputes submitted to the First Division (R. 210, Plaintiffs' Exhibit K).

It is submitted that such unanimity of understanding by the carriers, the labor organizations, and the members of the Adjustment Board would have been impossible if the term "yard-service employees" had been commonly understood in the rail industry as exclusive of yardmasters.

III

YARDMASTERS HAVE BEEN HISTORICALLY GROUPED AS TRANSPORTATION OPERATING EMPLOYEES AND HAVE BEEN CONSISTENTLY RECOGNIZED AND REFERRED TO AS EMPLOYED IN YARD SERVICE

The universal and accepted use of the term "yard service employees" as designating all crafts, including the yardmaster craft, whose work is directly connected with yard operation and the movement and switching of trains and cars in a railroad yard, is a matter of official record. Government agencies intimately associated with the railroads over long years, the rail carriers, and the rail employee organizations have repeatedly recognized this established and accepted usage in the rail industry.

The National Mediation Board, the First Division of the National Railroad Adjustment Board representative of both rail carriers and rail labor organizations, the Interstate Commerce Commission, the 1943 Emergency Board appointed under the Railway Labor Act to hear the wage demands of train and yard service employees, the Railroad Retirement Board, the United States Railroad Labor Board, and other rail experts have specifically grouped and referred to yardmasters in reports to Congress and in other official documents as operating employees in yard service. The uniformity of terminology used in these documentary references illustrates beyond controversy the established and accepted use of the term "yard service employees" as inclusive of yardmasters.

The First Division of the National Railroad Adjustment Board in its First Annual Report to Congress signed by Mr. Macy Nicholson, the board member representing the rail carrier group, and Mr. William Bishop, the board member representing the labor members on the First Division,

listed in the report the cases decided by the First Division *classified as to subject matter*. "Yardmaster" cases were classified under the heading "*yard service.*"[1]

It is emphasized that this is the *joint* report of the carrier and labor members of the First Division to Congress, made at a time when no thought was in mind of disrupting the work of the Board. It was made in recognition by the First Division that it had taken over the work of the four regional Boards, including yardmaster disputes. It is an affirmative acknowledgment by ten rail experts representative both of rail carriers and rail employee organizations that yardmasters are in yard service and within the jurisdiction of the First Division of the Adjustment Board. This in itself should have been sufficient to outweigh the oral testimony of three interested witnesses that the term had never been understood in the industry to include yardmasters.

The National Mediation Board likewise in its First Annual Report to Congress listed in Table VII the agreements between Class I carriers and their employees by craft or class and included *yardmaster* agreements within the "engine, train and *yard service*" group. In Table VII the Board indicated that the national labor organizations representing "yard service employees," including *yardmasters*, had agreements with 132 Class I carriers. It also indicated that system associations representing "yard-service employees" had agreements with 28 carriers which "includes 20 separate agreements with *yardmasters* in addition to the agreement held by the national labor organization *for the other yard service employees.*"[2]

Also, the National Mediation Board by Table VIII listed agreements between Class I carriers and the organizations representing the various rail crafts.[3] Under the heading

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[1] *First Annual Report of the National Mediation Board Including the Report of the National Railroad Adjustment Board* (for the fiscal year ended June 30, 1935) at page 51.

[2] See footnote 3 to Table VII, page 33, of the *First Annual Report of the National Mediation Board Including the Report of the National Railroad Adjustment Board* (for the Fiscal Year Ended June 30, 1935).

[3] See Table VIII opposite page 36 in the *First Annual Report of the Na-*

"*yard-service employees*" the following organizations were named as holding agreements with rail carriers: Brotherhood of Railroad Trainmen, Order of Railway Conductors, Switchmen's Union of North America, Railroad Yardmasters of North America and System Associations. All of these organizations represent *yardmasters* and the Railroad Yardmasters of America, except for a few stationmasters, represents yardmasters exclusively. (R. 162). Clearly, the National Mediation Board recognized yardmasters as "yard-service employees."

The National Mediation Board in its Second Annual Report to Congress again included yardmasters under the heading "yard service employees."[4]

In the Third Annual Report of the National Mediation Board for the fiscal year ended June 30, 1937, agreements held by the organizations representing yardmasters are again included under the heading "Yard Service Employees."[5]

Beginning with the Fourth Annual Report of the National Mediation Board, and in subsequent reports, the summary by the National Mediation Board of collective labor agreements in effect between various labor organizations and carriers has not listed a tabulation under the heading "Yard Service Employees." Instead, the agreements between the carriers and the employee organizations listed in columns 1 to 6, inclusive, reflect agreements held by organizations representing employees whose disputes *are subject to the jurisdiction of the First Division* of the Adjustment Board, namely, engineers, firemen and hostlers, conductors, brakemen, flagmen and baggagemen, yard foremen, helpers, switchtenders *and yardmasters*.[6]

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tional Mediation Board Including the Report of the National Railroad Adjustment Board (For the Fiscal Year Ended June 30, 1935).

[4] *Second Annual Report of the National Mediation Board Including the Report of the National Railroad Adjustment Board* (for the fiscal year ended June 30, 1936) in Table IX, page 28, and Table X opposite page 28.

[5] *Third Annual Report of the National Mediation Board Including the Report of the National Railroad Adjustment Board* (for the Fiscal Year Ended June 30, 1937) in table X opposite page 24 of the report.

[6] See Table 13 opposite page 32 of the *Fourth Annual Report of the Na-*

Columns 7 through 13 reflect agreements held by organizations representing shop craft employees whose disputes are subject to the *Second Division* of the Adjustment Board, namely, machinists, boilermakers, blacksmiths, sheet metal workers, electrical workers, car men, coach cleaners, power house employees and railway shop laborers.

Columns 14 through 20, inclusive, reflect agreements held by organizations representing employees whose disputes are subject to the *Third Division* of the Adjustment Board, namely, clerks, office, station and storehouse employees, maintenance-of-way employees, telegraphers, signalmen, dispatchers, dining car stewards, dining car cooks and waiters.

Columns 21 through 23, inclusive, indicate contracts held by organizations representing marine employees whose disputes go to the *Fourth Division* of the Adjustment Board. Column 24 indicates contracts held by organizations representing a miscellaneous group of employees not reflected in other columns on the table of agreements. In the main the employees in this miscellaneous group, such as marine employees, train chair car attendants, train porters, (as distinguished from sleeping car porters) hotel and restaurant employees, printers, bus and truck drivers, patrolmen, special agents, and other police employees, night watchmen, laundry workers and seamstresses, stock claim agents, grain elevator employees, crossing tenders, gatemen, stock yard employees and others are employees whose disputes fall within the jurisdiction of the *Fourth Division*. The "catch-all" jurisdiction of the Fourth Division was obviously designed as a provision for these *miscellaneous* employees many of whom were *unorganized at the time of the enactment of the Railway Labor Act amendments in 1934.*

The National Railroad Adjustment Board in its Official

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tional Mediation Board Including the Report of The National Railroad Adjustment Board (For the Fiscal Year Ended June 30, 1938) and the corresponding Table of Agreements in the subsequent Annual Reports of the National Mediation Board.

Index Digest to the Awards of the First Division[7] has consistently classified disputes involving "yardmasters" as a sub-heading under the heading "yard service." In the "General Index" of these volumes, the awards involving yardmasters are digested under the heading of "yardmasters" which appears as a sub-heading under the general heading "yard service." The same index outline was followed by the Train Service Board of Adjustment for the Western Region in its Index of Decisions published March 28 and May 1, 1931.

This alignment of yardmasters with the other train and yard service crafts by the National Mediation Board and the National Railroad Adjustment Board is in accord with the long established practice in the railroad industry. As early as April 18, 1921, the Interstate Commerce Commission issued an order establishing "Rules Governing the Classification of Steam Railway Employees and Reports of Their Service and Compensation." The Interstate Commerce Commission by its order of April 18, 1921, classified all railroad employees under six general groups or headings which are as follows:[8]

I. Executives, Officials and Staff Assistants.
II. Professional, Clerical and General.
III. Maintenance of Way and Structures.
IV. Maintenance of Equipment and Stores.
V. Transportation (*Other Than Train, Engine, and Yard*).
VI(a). Transportation, (*Yardmasters*, Switch Tenders and Hostlers.)
(b). Transportation (Train and Engine Service).

Throughout the entire period from 1921 to date the Interstate Commerce Commission has followed the same align-

[7] Published in three volumes on July 1, 1939, March 1, 1941 and March 1, 1943, Library of Congress, Washington, D. C.

[8] The order of the Interstate Commerce Commission of April 18, 1921, is set out in full by the United States Railroad Labor Board in *Wage Series, Report No. 2, Rules for Reporting Information on Railroad Employees, Together With a Classification and Index of Steam Railroad Occupations.* Library of Congress, Washington, D. C.

ment of rail employees by groups as set forth in the original order of April 18, 1921.[9] Thus, for long years the Interstate Commerce Commision has grouped yardmasters with the road and operating crafts.

Historically, this classification of rail employees into groups by the Interstate Commerce Commission follows the long established rail practice of listing or referring to non-operating employees as one group and the operating crafts as another group. Group V in the Interstate Commerce Commission classification designates employees engaged in "transportation (other than train, engine and yard)." As stated by the Interstate Commerce Commission in its Report to Congress on December 13, 1932, Group V comprises "employees in transportation service *not directly connected with yard operation or the running of trains and engines.*"[10]

Group VI of the Interstate Commerce Commission classification comprises the rail transportation operating crafts whose work is directly connected with yard operation or the running of trains and engines. Under Group VI the Interstate Commerce Commission, since April 18, 1921, has grouped yardmasters, switchtenders, hostlers, yard conductors, yard brakemen, yard engineers, yard firemen, as well as the operating employees in road service. Undoubtedly this alignment of operating employees was well known to Congress at the time of the consideration of the 1934 amendments to the Railway Labor Act.[11]

In defining the jurisdiction of the First Division of the

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[9] The order of the Interstate Commerce Commission dated April 18, 1921, and also the order of October 20, 1932, supplementary thereto, were annuled by the Interstate Commerce Commission by an order effective August 1, 1940. This new order of the Interstate Commerce Commission consolidated, with minor revisions, the orders of April 18, 1921, and October 20, 1932, and did not change the classification of yardmasters with road and yard operating crafts.

[10] *Effect of Principle of 8-hour Day in the Employment of All Classes of Railway Employees*, Ex Parte No. 106, House of Representatives Document No. 496, at page 23. Library of Congress, Washington, D. C.

[11] *Hearings Before the Committee on Interstate and Foreign Commerce, House of Representatives*, 73rd Congress, Second Session on H. R. 7650, at page 65; also in the Report to Congress by the Interstate Commerce Commission in Ex Parte No. 106, House of Representatives Document No. 496, dated December 13, 1932, the Interstate Commerce Commission classification of railway employees is set forth in detail at pages 35-37.

Adjustment Board over disputes involving train and yard service employees, Congress intended to encompass employees customarily referred to as the rail "operating" group. As noted above train, engine and yard service employees are ordinarily referred to as the operating group. For example, in the Eleventh Annual Report of the National Mediation Board, the Board stated:[12]

> "As in several years past, the train, engine, and yard service employees, commonly known as the 'operating' group, accounted during 1945 for the largest number of representation cases handled during the year * * *."

For many years yardmasters, who are in charge of yard work and whose preponderant duties are concerned with yard operation and the direction and supervision of switching movements within the yard (R. 162-168, 193, 75-78) and who are ordinarily promoted from, or demoted to, the yard train and engine crafts (R. 203, 212) have been grouped and referred to as operating employees in yard service.

Respondents concede that "*yardmasters are properly included among the operating employees,*"[13] but curiously enough respondents contend that yardmasters are not in yard service. Obviously all *operating* employees are either in *road* service or *yard* service and not in any other service. Yardmasters are not in road service so must be included among the yard operating employees.

The following excerpt from the Report to the President by the Emergency Board appointed May 31, 1943, pursuant to the Railway Labor Act, illustrates the common understanding of authorities in the rail industry:[14]

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[12] *Eleventh Annual Report of The National Mediation Board Including the Report of the National Railroad Adjustment Board* (for the Fiscal Year Ended June 30, 1945) at page 18. See also Tenth Annual Report at page 21.

[13] Brief of Respondents in Opposition to the Petition for Certiorari at page 14.

[14] *Report to the President by the Emergency Board, appointed May 31, 1943, Pursuant to the Railway Labor Act and Executive Orders 9172 and 9299.* (Report dated September 25, 1943, by Emergency Board composed of Walter P. Stacy, I. L. Scharfman and Frank M. Swacker.) Library of Congress, Washington, D. C.

"The railroad workers involved in this dispute are *train and engine and yard service employees* who, for the most part, are engaged in the actual movement of freight and passenger trains. They are frequently referred to as transportation employees or '*operating employees*,' in contrast to the '*non-operating employees*' who maintain railroad tracks and equipment, handle freight shipments and sell passenger tickets, and perform a multitude of other duties necessary in the transportation of freight and passengers by rail.

"Out of a total of approximately 1,350,000 workers on the payrolls of Class I carriers in May 1943, about 315,000 were operating employees whose proposals for a general wage increase are before this Board.

"Most *operating employees* are engaged in '*road service*,' that is, in the performance of various duties required for the movement of freight and passenger trains from one locality to another. A substantial number of railroad workers, however, are employed in '*yard service*.' The duties of this group include the making up and the breaking up of trains in connection with the preparation for, or the culmination of, terminal to terminal runs. These employees, furthermore, handle the switching of cars for industries within terminal or yard limits, which involves the placing of loaded or empty cars on the tracks or sidings of factories and industrial concerns and the picking up of unloaded or loaded cars from these tracks, and they also interchange cars between connecting carriers.

"These are thus two types of work performed by this large group of employees — *road service*, which in turn is divided into freight and passenger service, *and yard service*. In May 1943 slightly more than 141,000 or 45 percent of the approximately 315,000 railroad transportation employees were engaged in such service. Nearly 44,000 employees or about 13 percent of the total were in passenger service, and approximately 130,000 or 42 percent were *employees in yard service*, including switch tenders, hostlers *and yardmasters*."

This Emergency Board was composed of Walter P. Stacy, I. L. Scharfman and Frank M. Swacker, all of whom have

sat as referees with divisions of the Adjustment Board and have frequently been appointed as members of Emergency Boards to hear wage disputes of rail employees. They were recognized as authorities in the field of rail employer-employee relations. It should also be observed that Mr. Frank M. Swacker who participated in the preparation of this report also sat as referee with the First Division in the decisions of Dockets Nos. 1198, 4503, 4504 and 4505, in which the contention was first made on March 1, 1938, by the carrier members of the First Division that yardmasters were not subject to the jurisdiction of that division.[15]

Further illustrating the uniformity of terminology among experts intimately associated with the rail industry, it will be noted that the Railroad Retirement Board in its Operating Manual for Field Offices,[16] in listing the crafts represented by the various rail brotherhoods includes therein the following reference:

> "Brotherhood of Railroad Trainmen * * * *in yard service . . . yardmasters, assistant yardmasters,* yard conductors, foremen, flagmen, switchtenders * * *."

Under the same title and heading, the jurisdiction of the Switchmen's Union of North America is stated as follows:

> "Switchmen's Union of North America. Persons *in switching service* as switchmen, switchtender, towerman, interlocking operators, car retarder operators *and yardmasters.*"

Under the alphabetical arrangement of railroad occupational titles and job descriptions on page 145 the term "yardmasters" is defined as follows:

> "Supervises the make up and break up of trains, and the handling of cars, locomotives, and trains within

[15] See page 33-34 of this brief.
[16] Library of Congress, Washington, D. C.

defined yard limits. Direct yard switch crews. Must pass examination based on book of rules."

Again in The Railway Labor Act and the National Mediation Board (1940)[17] the following statement is made at page 42:

> "It will be noted that employees *in the train and engine service occupations* are rather completely represented by national organizations. The notable *exception* to this statement *applies to yardmasters.* All 71 of the carriers considered the employees in this craft or class are without representation."

The Train Service Board of Adjustment for the Western Region, in Decision No. 2948, dated February 21, 1929 (R. 209, Plaintiffs' Exhibit J) sets forth a *joint* statement of the facts of the dispute as submitted *by the carrier and The Order of Railway Conductors* as follows:

> "Joint statement of Facts: *Prior to 1920* and subsequent thereto, E. J. McMartin, J. E. Elliott and H. T. Ireland were employed in the Chicago Freight Terminal *as yardmasters.* On or about January 1, 1927, they were permitted to give up these positions and displace conductors from positions in the Chicago switching district on the basis of their employment *in yard service prior to 1920.*"

The Director General of Railroads in General Order No. 27 with its supplements, addenda, amendments and interpretations issued on April 23, 1919, stated:[18]

> "Effective January 1, 1919, where there is no existing agreements or practice more favorable to employees, the wages of yard foremen *who also act as yardmasters*

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[17] Cited in *General Committee, etc. vs. Missouri-Kansas-Texas R. Co.*, 320 U. S. 323, 330.

[18] General Order No. 27, together with its supplements and interpretations, is on file with the United States Railroad Administration Records in the National Archives, Washington, D. C.

(designated in some schedules as 'footboard' yardmasters) will be not less than 40c per day in excess of the yard foremen's rates. The same rules for the basic day and overtime shall apply to such employees as applies *to other yardmen.*"

Further illustrating the common understanding in the industry, we find in the Annual Report of the United States Board of Mediation to Congress for the year 1927 a report of the award of an arbitration board for an increase in wages of 60,000 conductors, trainmen and yardmen represented by the Order of Railway Conductors and the Brotherhood of Railroad Trainmen on railroads in Western territory and on page 46 the Board stated:[19]

> "The award further provides that all roads where trainmen legislate for *yardmasters* and *assistant yardmasters* the same increases will be added to present rates as were awarded to yard foremen. Trainmen were granted an increase in wages by this award. The increase *thus granted yardmen*, the award states, amounts to 7½%."

The foregoing references demonstrate beyond controversy the common recognition in the rail industry of yardmasters as yard service employees.

There is no dispute but that yard work refers to yard operation and the switching of trains in a railroad yard. Any employee engaged in yard operation and the movement of trains in a railroad yard is said to be in yard work or in yard service. The terms used are not mysterious to those outside the railroad industry and have been defined in the standard dictionaries. For instance, Webster's International Dictionary defines a "yard" as follows:

> "In railroad usage, the space or tract adjacent to a railway station or terminus, which is used for the

[19] Library of Congress, Washington, D. C.

switching or making up of trains, the accommodation of rolling stock, and similar purposes."

"Yardman" is defined as:

> "One who is employed in a railway yard under the yardmaster, to assist in switching cars and making up trains."

A "yardmaster" is defined as:

> "A man employed under the manager of a railway to superintend a terminal yard, whose duty it is to see to the proper switching and distribution of cars coming into the yard, and to the proper making up of trains to be sent out of the yard."

Similar definitions will be found in the Century Dictionary and Cyclopedia.

In the Dictionary of Occupational Titles issued by the United States Department of Labor the following definitions appear:

> "Yardmaster—(II) (RR Trans.) 0-98.73. supervise the make up and break up of trains, and the traffic of cars, locomotives, and trains within the railroad yard; issues written orders to train organizations; investigates complaints concerning poor freight service."
>
> "Conductor, yard (RR Trans.) 0-92.21. directs a switch engine crew in accordance with instructions of yardmasters II; signals engineer, and gives orders to switch engine crew in making up trains and shunting cars to the proper place in the yard."
>
> "Yard—a large clearing in the vicinity of a railroad station where trains are made up, cars are spotted and freight cars are stored on sidings."

The foregoing definitions of the yardmasters' duties are not essentially different from that given by the United

States Railroad Labor Board in Wage Series, Report No. 2, issued in May, 1921. At page 249 of the report of the United States Railroad Labor Board the yardmaster group is defined as follows:[20]

> "This group includes positions in which the preponderate duties of incumbents are to supervise or to assist in supervising the work of employees engaged in the making up, breaking up and movement of trains within a yard."

At page 257 of the same report the United States Railroad Labor Board describes the yard conductor and yard foremen group as follows:

> "The above class includes positions in which the duties of incumbents are to supervise and assist the work of switchmen and helpers in yard switching and yard work train service, including supervision of the making up and breaking up of train; and to perform related work."

At page 258 of Wage Series Report No. 2 the Railroad Labor Board describes yard brakemen, yard helpers and switchtenders as follows:

> "The above classes include positions in which the duties of incumbents are to couple, uncouple and ride cars in connection with the breaking up and making up of trains; to handle switches; and to perform related work in connection with yard switching or switch tending service."

At page 259 of the United States Railroad Labor Board Report the yard engineer and motorman group are defined:

> "The above classes include positions in which the duties of incumbents are to separate steam, electrical

[20] Library of Congress, Washington, D. C.

or other power used in yard switching and yard work train service; and to perform related work."

The United States Railroad Labor Board described the yard fireman and helper group (page 260) as follows:

> "The above class includes positions in which the duties of incumbents are to fire engines or assist motormen in operating electric locomotives used in yard switching and yard work trains service; and to perform related work."

The hostler group was defined by the United States Railroad Labor Board as follows:

> "The class 'outside hostler' includes positions in which the duties of incumbents are to handle locomotives between passenger stations and engine houses or yards or on main tracks, having unrestricted territory within yard limits; other than the operation of engines in yard switching service or road service.
>
> "The class 'outside hostler helper' includes positions in which the duties of incumbents are to assist outside hostlers in the handling of locomotives.
>
> "The class 'inside hostler' includes positions in which the duties of incumbents are to handle locomotives in and around engine houses, or on engine tracks at tie-up points, having restricted territory."

In accord with the foregoing definitions, the intervening defendant, Great Northern Railway Company, in its consolidated code of transportation rules and general instructions defines the duties of the yardmaster as follows (R. 167):

> "They have charge of yards, of the men employed, and handling of trains and the movement of cars therein."

The petitioners submit that the foregoing references re-

flect the uniform understanding of rail management, organizations representing employees, and government agencies intimately familiar with the rail industry that yardmasters are operating employees engaged in supervising the movement of trains and cars in railroad yards and customarily referred to as yard service employees. It is inconceivable that Congress could have intended that yardmasters be not regarded as in yard work or "yard service" and that this group of operating employees should be excluded from the designation of the operating groups of "train and yard service employees" in Section 3, First (h) of the Railway Labor Act.

IV

CONGRESS HAS TWICE REFUSED TO AMEND THE RAILWAY LABOR ACT SO AS TO EXCLUDE YARDMASTER DISPUTES FROM THE JURISDICTION OF THE FIRST DIVISION

In *1940* and again in *1941* in the 76th and 77th Congress, bills were introduced at the request of the American Shortline Railroad Association which contained the following provision:

> "The First Division of the Adjustment Board shall have jurisdiction over disputes involving train- and yard-service employees of carriers, including engineers, firemen, hostlers, outside hostler helpers, conductors, trainmen and yard-service employees, *except yardmasters and other subordinate officers.*"

In both sessions of Congress the Senate Committee on Interstate Commerce rejected these proposed amendments to the Railway Labor Act (R. 169, 170).

In commenting on a similar failure to obtain a legislative amendment, this court in *Federal Trade Commission vs. Bunte Bros.*, 312 U. S. 349, said:

> "This practical construction of the Act by those entrusted with its administration is reinforced by the Commission's *unsuccessful attempt* in 1935 to secure from Congress an express grant of authority * * *"

The judgment of the trial court, affirmed on appeal by the Circuit Court, does what Congress refused to do by legislation. As this court said in *Western Union Telegraph Co. vs. Linroot*, 323 U. S. 490:

> "To translate this Act by process of interpretation into an equivalent of the bills Congress rejected is, we think, beyond the fair range of interpretation."

As to the proposed amendments, the Circuit Court said (R. 278):

> "Both bills went to the committee and were never reported out. Whether their demise by that method was due to the fact that the committee thought they were undesirable or unnecessary, we are not informed, and no presumption arises as to the cause."

It is significant that the American Short Line Railroad Association, composed of more than three hundred railroads, thought that these amendments were necessary to except and exclude yardmasters from the general designation of "yard-service employees," and the submission of the amendments reflected the view of the Short Line Railroads as to their interpretation of the term. Obviously, this fact, coupled with Congressional inaction on the proposed amendments, reinforces the contention of the petitioners as to Congressional intent and the Circuit Court erred in dismissing it as *entirely irrelevant*.

V

THE RAILWAY LABOR ACT HAS BEEN GIVEN AN INTERPRETATION CONTRARY TO THE AIM AND NATURE OF THE LEGISLATION

The primary object of all statutory interpretation is to ascertain and give effect to the intention of the legislature. In determining this intention the first and fundamental source is the words of the statute itself. These principles were stated by this court in *Federal Trade Commission vs. Bunte Bros.*, 312 U. S. 349, 351 as follows:

> "* * * * The construction of every statute presents an unique problem in which words derive vitality from the aim and nature of the specific legislation."

The aim and purpose of Congress in the enactment of the amendments to the Railway Labor Act in 1934 is apparent from the structure of the Act. In creating the National Railroad Adjustment Board the prime object of Congress was to create a board representative of both carriers and employees, composed of men trained and experienced in the intricate rules of employees in the transportation crafts.

With this object in view, Congress separated the Adjustment Board into four independent divisions and, as nearly as possible, grouped under the jurisdiction of each division the crafts of employees *in related lines of work.* The first three divisions are given jurisdiction over disputes of employees of carriers engaged in transportation *by rail*, and the Fourth Division is given jurisdiction over the disputes of employees of carriers engaged in transportation *by water.* The members of the first three divisions of the Adjustment Board are representative of rail labor organizations and of rail carriers. The members of the Fourth

Division of the Board are representative of three standard maritime labor unions and of carriers directly or indirectly engaged in marine transportation.

The First Division is given jurisdiction over the disputes of employees in the *operating* group, or the train and yard service employees. The shop craft employees, represented by shop craft unions, were placed under the jurisdiction of the Second Division. The Third Division was given jurisdiction over a miscellaneous group of rail crafts.

In giving the Fourth Division jurisdiction over marine employees and a "catch-all" jurisdiction, Congress evidently intended to provide for certain unorganized crafts, relatively few in number, such as special agents, patrolmen, lieutenants and sergeants of police, night watchmen, stock claim agents, train porters, grain elevator employees, bus and truck drivers, crossing tenders, gatemen, stockyard employees, and chair car attendants.[1]

The petitioners submit that the general scheme and design of the Railway Labor Act, particularly the provisions of Section 3, should have impelled the conclusion that jurisdiction over yardmaster disputes lay in the First Division. The very purpose of the Act was to achieve an administrative forum composed of men informed by long training and experience in the technical problems of the particular craft disputes submitted to them. It requires a most violent assumption as to Congressional purpose, unsupported by any convincing proof and contrary to every available aid to Congressional purpose, to conclude that Congress intended that yardmasters should submit their disputes to a Board representative of carriers directly or indirectly engaged in transportation by water and labor organizations representative of marine employees.

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[1] See miscellaneous groups listed in Table XIV of the *Eleventh Annual Report of the National Mediation Board* (for the Fiscal Year Ended June 30, 1945); see also the Annual Reports and the Awards of the Fourth Division of the Adjustment Board.

VI

THE CIRCUIT COURT ERRED IN HOLDING ITSELF BOUND BY THE FINDINGS OF THE DISTRICT COURT

The fundamental error of the lower courts lies in the attempt to apply the rule stated by this court in *O'Hara vs. Luckenbach S. S. Co.*, 269 U. S. 364. In that case this court quoted with approval from *Unwin vs. Hanson* (1891) 2 Q. B. 115, 119, as follows:

> "If the Act is one passed with reference to a particular trade, business or transaction, and words are used which *everybody conversant with that trade, business or transaction knows and understands to have a particular meaning in it, then the words are to be construed as having that particular meaning, though it may differ from the common or ordinary meaning of the words.*"

It will be observed that the rule in *O'Hara vs. Luckenbach* is applicable only where it is shown that technical words have acquired a particular meaning *universally so understood by everybody conversant in the trade.* In the Luckenbach case this court determined the technical meaning of the nautical term "divided into watches" by reference to a marine encyclopedia and a dictionary of sea terms. Obviously, to establish that a trade term has acquired a particular technical meaning, the evidence must be clear, convincing and uncontradicted. In such a case the rule is a relevant aid in statutory construction. But even then the rule is not applied to the exclusion of other relevant aids to Congressional intent. *O'Hara vs. Luckenbach*, 269 U. S. 364; *MacEvoy vs. U. S.*, 322 U. S. 102, 108; *Massachusetts Protective Asso. vs. U. S.*, 114 F. 2d. 304; *General Petroleum Corp. vs. U. S.*, 24 F. Supp. 285.

In this case the District Court attempted to "find" the universal and commonly accepted "railroad usage" of the

terms "yard service" and "yard service employees" from *conflicting* oral evidence. The District Court concluded that the "preponderance" of the evidence was in favor of respondents. The Circuit Court concluded that the oral evidence constituted "substantial evidence" in support of the findings and that it was "bound" by them.

The Circuit Court was, of course, in no sense "bound" by the findings of the District Court. *Bogardus vs. Commissioner of Internal Revenue*, 302 U. S. 34; *U. S. vs. Anderson*, 7th Circuit, 108 F. 2d. 475; *U. S. vs. Armature Rewinding Co.*, 8th Circuit, 124 F. 2d. 589. The rule has been stated by the Seventh Circuit in *U. S. vs. Anderson*, supra, to be:

> "*The problem is one of construction*, one of application of the taxing statute. In such situations, the findings of the trial court, while worthy of great consideration, are not conclusive, cf. Federal Rule 52(a), Federal Rules of Civil Procedure, 28 U. S. C. A. following Section 723c; and, where the ultimate finding is a conclusion of law, or at least a determination of a mixed question of law and fact, it is subject to judicial review, and on such review the appellate court may substitute its judgment for that of the trial court, *Bogardus vs. Commissioner*, 302 U. S. 34, 39, 58 S. Ct. 61, 82 L. Ed. 34."

Aside from the fact that the oral testimony of the three witnesses for the respondents does not support the findings of a universal and commonly accepted trade usage of the term "yard service employees" as exclusive of the yardmaster craft, such a finding is manifestly erroneous and impossible in the face of conclusive documentary evidence to the contrary.[1] At the very least, the use of the term "yard service employees" by the National Railroad Adjustment Board and the National Mediation Board in reports to Congress and by other rail experts in official doc-

[1] See authorities cited in Division III of this brief.

uments reflects such a common and universal understanding of the term in the industry as to preclude entirely a finding based on the testimony of interested witnesses that the term has been universally understood as descriptive of only certain crafts exclusive of other yard crafts.[1]

Petitioners submit that the District Court erred in purporting to find a universal and accepted use of the term "yard service employees" as exclusive of yardmasters on the basis of conflicting oral testimony and contrary to conclusive documentary evidence. It is further submitted that the Circuit Court in asserting itself "bound" by the findings of the District Court precluded itself from exercising its judicial function of statutory interpretation.

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[1] See also footnote 23 on page 23 of this brief.

CONCLUSION

Seldom has the intent of Congress more plainly appeared from a consideration of relevant aids to Congressional purpose. The decisions below destroy the fundamental purpose of Congress in creating the National Railroad Adjustment Board as a tribunal of experts in the disputes submitted to it. It creates jurisdictional distinctions which must inevitably foster future conflict in the work of the Board and hamper it in the exercise of its functions.

The petitioners submit that the judgment of the Circuit Court should be reversed.

Respectfully submitted,

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October, 1946

APPENDIX

Excerpts from Act of May 20, 1926, as amended by Act of June 21, 1934, *45 U. S. C., Sec. 151*, et seq.

Section 1, Fifth, of the Railway Labor Act provides as follows:

> "Fifth. The term 'employee' as used herein includes every person in the service of a carrier (subject to its continuing authority to supervise and direct the manner of rendition of his service) who performs any work defined as that of an employee or subordinate official in the orders of the Interstate Commerce Commission now in effect, and as the same may be amended or interpreted by orders hereafter entered by the Commission pursuant to the authority which is hereby conferred upon it to enter orders amending or interpreting such existing orders: *Provided, however*, That no occupational classification made by order of the Interstate Commerce Commission shall be construed to define the crafts according to which railway employees may be organized by their voluntary action, nor shall the jurisdiction or powers of such employee organizations be regarded as in any way limited or defined by the provisions of this Act or by the orders of the Commission."

Section 3, First (h) of the Railway Labor Act provides as follows:

> "(h) The said Adjustment Board shall be composed of four divisions, whose proceedings shall be independent of one another, and the said divisions as well as the number of their members shall be as follows:
>
> "First division: To have jurisdiction over disputes involving train- and yard-service employees of carriers; that is, engineers, firemen, hostlers, and outside hostler helpers, conductors, trainmen, and yard-service employees. This division shall consist of ten members, five of whom shall be selected and designated by the carriers and five of whom shall be selected and desig-

nated by the national labor organizations of the employees.

"Second division: To have jurisdiction over disputes involving machinists, boilermakers, blacksmiths, sheet-metal workers, electrical workers, car men, the helpers and apprentices of all the foregoing, coach cleaners, power-house employees, and railroad-shop laborers. This division shall consist of ten members, five of whom shall be selected by the carriers and five by the national labor organizations of the employees.

"Third division: To have jurisdiction over disputes involving station, tower, and telegraph employees, train dispatchers, maintenance-of-way men, clerical employees, freight handlers, express, station, and store employees, signal men, sleeping-car conductors, sleeping-car porters, and maids and dining-car employees. This division shall consist of ten members, five of whom shall be selected by the carriers and five by the national labor organizations of employees.

"Fourth division: To have jurisdiction over disputes involving employees of carriers directly or indirectly engaged in transportation of passengers or property by water, and all other employees of carriers over which jurisdiction is not given to the first, second, and third divisions. This division shall consist of six members, three of whom shall be selected by the carriers and three by the national labor organizations of the employees."

APPENDIX II

The First Division of the National Railroad Adjustment Board is composed of five representatives of the rail carriers and five representatives of the following national rail employee organizations:

Brotherhood of Locomotive Engineers

Brotherhood of Locomotive Firemen & Enginemen

Order of Railway Conductors of America

Brotherhood of Railroad Trainmen
Switchmen's Union of North America

The Fourth Division of the National Railroad Adjustment Board is composed of three representatives of carriers directly or indirectly engaged in transportation by water and three representatives of the following national marine employee organizations:

International Longshoremen's Association
National Marine Engineers' Beneficial Association
Inlandboatmen's Union of the Pacific

APPENDIX III

Award No. 2710
Docket No. 1198

NATIONAL RAILROAD ADJUSTMENT BOARD
FIRST DIVISION

The First Division consisted of the regular members and in addition Referee Frank M. Swacker when award was rendered.

PARTIES TO DISPUTE:

ORDER OF RAILWAY CONDUCTORS
BROTHERHOOD OF RAILROAD TRAINMEN
THE DENVER AND RIO GRANDE WESTERN
RAILROAD COMPANY

STATEMENT OF CLAIM: Claim of R. D. Griffin for one day's pay each date since January 1, 1932, account of being displaced off the night yardmaster's job, which he bid in and was assigned to under settlement of December 14, 1929, and improperly displaced by Assistant Yardmaster Roy Davis who failed to bid on the job when bulletined

February 10, 1929. Articles 14 (a) and (f), Yard Schedule, and Decisions 361, 362 and 597, Train Service Board of Adjustment for the Western Region.

JOINT STATEMENT OF FACTS: Mr. R. D. Griffin was awarded the position of Night Yardmaster in Salt Lake City Yard under bulletin, dated Feb. 10, 1929, being the only applicant for the position. Jan. 1, 1932, the position of Assistant Yardmaster with assignment from 7 A.M. to 3 P.M., held by Roy Davis, was abolished and he was permitted to displace Night Yardmaster Griffin.

Claim was made that inasmuch as Assistant Yardmaster Davis failed to bid on the night yardmaster vacancy of Feb. 10, 1929, he should not be permitted to exercise seniority in that position.

Claim in this case is for $9.66 per day at night yardmaster's rate of pay in Salt Lake City.

Both parties desire oral hearing in this case.

POSITION OF EMPLOYEES: The Organization contends that Article 14, Paragraphs (a) and (f), of the Yardmen's schedule reading as follows:

> "(a) Seniority rights of yardmen will date from the day they first perform service in the yard where employed. The right to preference of work and promotion will be governed by seniority, capability to be considered."

> "(f) When a permanent vacancy occurs or a new position is created, a bulletin will be posted for a period of 24 hours and yardmen desiring same will so indicate in writing and a senior man applying will be assigned."

were violated, and also that Decisions 361, 362 and 597 of the Train Service Board of Adjustment for the Western Region support the claim.

Seniority and preference of work in filling the position of Assistant Night Yardmaster have been governed by the senior qualified man making application assigned. A yard-

man failing to bid on such position forfeits his right to the successful applicant, as shown in decisions of the Train Service Board of Adjustment for the Western Region, referred to in the submission. The decisions should apply the same to individuals failing to bid from Assistant Yardmaster to Night Yardmaster, as it would in failing to bid from Helper or Foreman to Assistant Yardmaster, and this case is the first time there is any record of an Assistant Yardmaster being permitted, after failing to bid on a Night Yardmaster position, to later be permitted to displace a man from the position secured by bid.

In 1928, the Night Yardmaster's position was bulletined and filled first by Yardmaster Smith, and again during this same year by bid by Assistant Yardmaster Criswell. Was again bulletined on or about January 2, 1929, awarded to former Yardmaster Mayfield, who had previously forfeited his rights in April, 1928, by giving up the position of Yardmaster and returned to service as Engine Foreman. Protest was made by Yardmaster Griffin to the assignment of Mayfield, January 2, 1929, and the case handled by the Organization with the Carrier, and settlement reached with the Vice Presidents of the Conductors and Trainmen Dec. 14, 1929, agreeing to place Yardmaster Griffin in the vacancy and pay him the difference in the amount earned as Assistant Yardmaster and what he would have earned as Night Yardmaster.

During this entire period Mr. Roy Davis was filling the position of Assistant Yardmaster and failed to bid on the night job. The Assistant Yardmaster's job he was holding was not abolished. The hours were changed covering his assignment 7:00 A.M. to 3:00 P.M. to 6:00 A.M. to 2:00 P.M.

POSITION OF CARRIER: R. D. Griffin was awarded the position of night yardmaster at Salt Lake under Bulletin No. 28 of Feb. 10, 1929. Mr. Griffin's seniority date as a yardmaster is that of Sept. 22, 1926. At this time Roy Davis was holding a position as assistant yardmaster at

30th South St. on the 7 A.M. to 3 P.M. shift. His seniority date as yardmaster is April 5, 1923, As assistant yardmaster, commencing work at 7 A.M., Mr. Davis was available for use to fill temporary vacancies caused by the General Yardmaster being off and he was so used. Mr. Davis, no doubt, considered the day assignment as assistant yardmaster preferable to that of nights, therefore, did not bid on Bulletin 28 of Feb. 10, 1929, for the night yardmaster position. On or about Jan. 1, 1932, the position of assistant yardmaster at 30th South St., 6 A.M. to 2 P.M. Shift, was abolished and Roy Davis, displaced in this reduction of force, exercised his seniority and displaced Mr. Griffin, a junior man holding position of night yardmaster.

On Nov. 25, 1932, as a matter of discipline, Mr .Davis was demoted from the position of Night Yardmaster to the ranks of a switchman. L. H. Criswell, senior to Griffin as a yardmaster, bid in and was assigned the night yardmaster position. The demotion of Roy Davis as a yardmaster was handled by the Employees as a grievance, and as a result his seniority rights as a yardmaster were restored July 7, 1933. Thereupon, Mr. Davis was again placed in the night yardmaster position, and L. H. Criswell was placed as an assistant yardmaster, R. D. Griffin was placed as assistant yardmaster on or about the date Mr. Davis was demoted. When Mr. Davis' seniority rights as a yardmaster were restored he was again returned to that position on or about July 15, 1933, which again set Mr. Griffin back to the extra board as a yardmaster. On August 21, 1933, an additional assistant yardmaster position at 30th South Street was established and Mr. Griffin was placed in that position.

At the present time M. E. Gilson is General Yardmaster, Roy Davis is Night Yardmaster, and H. F. Stubbs is Assistant Yardmaster at 6th South St. 7:30 A.M. to 3:30 P.M. L. H. Criswell is Assistant Yardmaster 30th South, 1 P.M. to 9 P.M., and R. D. Griffin is Assistant Yardmaster, 30th South St., 9 P.M. to 5 A.M. The seniority list of yardmasters at Salt Lake, Jan. 1, 1932, was as follows:

Gilson, M. E.	3-15-1921
Stubbs, H. F.	8- 5-1922
Davis, Roy	4- 5-1923
Criswell, L. H.	6-13-1925
Griffin, R. D.	9-22-1926
Crostick, R. J.	7-17-1928
Middleton, C. A.	10-17-1928
McNeill, E. S.	5- 5-1929
McPheeters, H. E.	5- 1-1930

The Carrier contends that an assistant yardmaster does not forfeit his yardmaster seniority rights because when holding a position as such during the daytime he does not bid on a vacancy as night yardmaster. Reference is made by the Employees to decisions 361, 362 and 597 of the Western Train Service Board of Adjustment as supporting this claim. The Carrier contends these decisions do not support the claim, but on the contrary, they do support the position of the Carrier, in that it was the position of the Carrier in those cases that seniority as yardmasters prevailed, and that senior yardmen who had not established a date as yardmasters were not entitled to displace such employees, although they may have been junior as switchmen.

During the period involved in this claim Mr. Griffin was employed in various capacities in yard service at Salt Lake City.

FINDINGS: The First Division of the Adjustment Board, upon the whole record and all the evidence, finds that:

The carrier or carriers and the employee or employees involved in this dispute are respectively carrier and employee within the meaning of the Railway Labor Act, as approved June 21, 1934.

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

The parties to said dispute were given due notice of hearing thereon.

An assistant yardmaster does not forfeit his yardmaster

seniority rights because when holding a position as such during the daytime he does not bid on a vacancy as night yardmaster. In the instant case day assistant yardmaster job held by Roy Davis was abolished, Griffin being his junior on night yardmaster job, Davis was entitled to displace Griffin.

AWARD.

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of First Division

ATTEST: (Sgd) T. S. McFarland
Secretary

Dated at Chicago, Illinois, this 31st day of March, 1938.